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IN THE

Supreme Court of the United States

OCTOBER TERM, 198[illegible]

MULLINS COAL COMPANY,
INCORPORATED OF VIRGINIA
[illegible] REPUBLIC INSURANCE COMPANY
[illegible] RIDGE COAL CORPORATION,
Petitioner,

v.

THE DIRECTOR, OFFICE WORKERS'
[illegible]ATION PROGRAMS,
[illegible] DEPARTMENT OF LABOR,
[illegible], LUKE R. RAY,
[illegible] E. STAPLETON and
[illegible]LAND COAL COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT [illegible]LAND COAL COMPANY'S BRIEF IN SUPPORT OF PETITIONER

DAVI[illegible]
[illegible], HOLT & [illegible]
[illegible]
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[illegible] Virginia [illegible]
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-327

MULLINS COAL COMPANY,
INCORPORATED OF VIRGINIA
OLD REPUBLIC INSURANCE COMPANY
and JEWELL RIDGE COAL CORPORATION,
Petitioner,

v.

THE DIRECTOR, OFFICE WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
GLENN CORNETT, LUKE R. RAY,
GERALD R. STAPLETON and
WESTMORELAND COAL COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT WESTMORELAND COAL COMPANY'S BRIEF IN SUPPORT OF PETITIONER

I.

STATEMENT OF THE CASE

This matter arises under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 which provides for the payment of compensation benefits where it is established that a

miner's total disability or death was due to coal workers' pneumoconiosis arising out of coal mine employment. [1] The last coal mine operator which employed a coal miner may be liable for the payment of benefits to a claimant where the claim was filed after June 30, 1973. (30 U.S.C. §§ 925(a), 932(b), 933) Claims filed prior to July 1, 1973 were filed with the Social Security Administration (30 U.S.C. §§ 921-924) Those claims filed after June 30, 1973 in which the last coal mine employment occurred prior to January 1, 1970 or in which no coal mine operator can be identified and held responsible, are paid by the Black Lung Disability Trust Fund. (30 U.S.C. § 934) This Trust Fund is funded through the collection of a tax on each ton of coal mined within the United States. (26 U.S.C. §§ 4121 and 9501)

In those claims filed after June 30, 1973 the United States Department of Labor processes and adjudicates the application for benefits in accordance with procedures set forth in the Black Lung Benefits Act. (30 U.S.C. § 932(a)) These procedures involve the filing of an application before a Deputy Commissioner of the United States Department of Labor and the determination of entitlement or nonentitlement of benefits by that Deputy Commissioner. (33 U.S.C. §§ 919(a-c)) The decision of the Deputy Commissioner may be appealed by either a claimant who is denied benefits or an operator who has been held responsible for the payment of benefits. This appeal takes the form of a *de novo* hearing before an administrative law judge. (20

[1] Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, was amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, the Black Lung Benefits Amendments of 1981, 95 Stat. 1635 and the Black Lung Benefits Revenue Act of 1981, 95 Stat. 1635.

C.F.R. § 725.421) That hearing before an administrative law judge is governed by the provisions of the Administrative Procedure Act. (5 U.S.C. § 554) (hereinafter "A.P.A."). § 422(a) of the Black Lung Benefits Act, as amended, incorporates 30 U.S.C. § 932(a), by referencing the procedural provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended. [2]

Any party dissatisfied with an administrative law judge decision may prosecute an appeal to the Benefits Review Board of the United States Department of Labor. (30 U.S.C. §§ 901 *et seq.* and 20 C.F.R. §§ 801 *et seq.*). An appeal to the Benefits Review Board is not a *de novo* appeal and is limited in scope. (20 C.F.R. § 802.301) Any party dissatisfied with a decision of the Benefits Review Board may appeal as a matter of right to the United States Court of Appeals for the Circuit in which the injury occurred or in which substantial coal dust exposure took place. (33

[2] Section 422(a) states that

> [d]uring any period after December 31, 1973, in which a state workmen's compensation law is not included on the list published by the Secretary under Section 421(b) of this part, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927), as amended, and as it may be amended from time to time (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof), shall (except as otherwise provided in this subsection or by regulations of the Secretary and except that references in such Act to the employer shall be considered to refer to the trustees of the fund, as the Secretary considers appropriate and as is consistent with the provisions of [§ 424] § 9501(d) of the Internal Revenue Code of 1954, be applicable to each operator of a coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine, . . .

U.S.C. § 921(c); *Consolidation Coal Co. v. Chubb*, 741 F.2d 968 (7th Cir. 1984)) The scope of review of the United States Court of Appeals is similar to that of the Benefits Review Board. The scope of review is limited to a determination of whether or not the decision of the administrative law judge is supported by the substantial evidence in the record when considered as a whole and in compliance with the law.

This matter involves the five statutory presumptions which operate to ease the claimant's burden of proving each element of a claim by presuming one or more elements upon the establishment of various invoking facts. (30 U.S.C. § 921(c)) After the 1972 Amendments, the Secretary of Health, Education and Welfare adopted special interim rules for the adjudication of claims filed under Part B of the Act which further eased the claimant's burden to establish a prima facie case. (20 C.F.R. § 410.490)

These interim adjudicatory rules were directly responsive to the concerns of Congress and premised solely on administrative considerations. At that time Congress noted

> [the] backlog of claims which have been filed . . . cannot await the establishment of new facilities or the development of new medical procedures. They must be handled under present circumstances in the light of limited medical resources and techniques.
>
> Accordingly the Committee expects the Secretary [of Health, Education and Welfare] to adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of these amendments.[3]

20 C.F.R. § 410.490 included a lengthy introductory statement quoting liberally from this legislative history. The standards adopted did not represent, and did not purport to represent, sound medical criteria for evaluating disability due to pneumoconiosis. Instead the rules presume total disability or death due to pneumoconiosis upon the presentation of alternative kinds of evidence, and were subject to rebuttal.

When the Act was amended by the Black Lung Benefits Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, Congress noted that there was no indication that the concerns justifying the interim rules governing claims under Part B had been resolved when Part C became effective:

> The Senate directives with regard to the "interim" standards clearly spoke to standards that would remain until "the establishment of new facilities or the development of new medical procedures." (S. REP. No. 743, at 18) That was the clear and explicit condition underscoring the need for the duration of "interim" medical standards. Under the H.E.W. interpretation, these developments somehow magically occurred at the onset of Part C of the program. The Congress did not intend in adopting the Senate initiative, as H.E.W. so unequivocally asserts, that this "interim" approach should suddenly conclude at the determination date for new Part B filings.[4]

[3] S. REP. No. 743, 92nd Cong., 2d Sess. 18 (1972), *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 2305, 2322-23.

[4] H.R. REP. No. 1, 95th Cong. 1st Sess. 15 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 237, 251; *and in* HOUSE COMM. ON EDUCATION AND LABOR, BLACK LUNG BENEFITS REFORM ACT AND BLACK LUNG BENEFITS REVENUE ACT OF 1977, 96th Cong. 522 (1979).

As a result, the Secretary of Labor was directed to adopt criteria not more restrictive than the interim criteria for all claims reviewed and filed prior to the adoption of permanent standards. (30 U.S.C. § 902(f)(2)) These criteria appear at 20 C.F.R. § 727.203, and are commonly referred to as the "interim presumption."[5] Although the criteria developed by the Secretary of Labor are not more restrictive than those applied under Part B, they operate in a system which is distinct, in that the rules of evidence and burdens of proof to be applied to the parties are derived from different sources. These distinctions are the product of the statute itself, and were acknowledged throughout its legislative history. The question of the burden of proof to be applied to the interim presumption constitutes the basic issue for consideration by this Court.

In the case of *Stapleton v. Westmoreland Coal Co.*,[6] (unpublished A.L.J. opinion, April 14, 1981), (App. 1096a), the administrative law judge invoked the interim presumption based upon a single positive x-ray. He reached this conclusion even though the record contained two additional x-rays which were read as negative for the presence of coal workers' pneumoconiosis. (App. 113a) The administrative law judge concluded that ten years of coal mine employment and a single positive x-ray were all that were necessary for invocation of the interim presumption. The administrative law judge felt that there was no necessity for consideration of the two other negative chest x-rays prior to invocation of the interim presumption. On

[5]The Department of Labor's permanent standards were adopted effective March 31, 1980 and are found at 20 C.F.R. § 718.1 *et. seq.*

[6] Westmoreland Coal ~~Company~~ is an independent corporation without parent, subsidiary or other corporate relationship requiring disclosure under Rule 28.1.

considering rebuttal, however, the administrative law judge weighed all the chest x-ray evidence, as well as the medical opinions of record, and concluded that the claimant did not suffer from pneumoconiosis and, therefore, found rebuttal. (20 C.F.R. § 727.203(b)(4)) Stapleton thereafter appealed to the Benefits Review Board. The Benefits Review Board held that the administrative law judge erroneously invoked the presumption pursuant to 20 C.F.R. § 727.203(a)(1) without weighing all the x-ray evidence prior to invocation to determine whether the evidence as a whole supported invocation. However, the Benefits Review Board held that this error is harmless, because the administrative law judge did consider the entirety of the x-ray evidence on rebuttal and credited the negative interpretations over the positive readings. The Board concluded that substantial evidence supported the administrative law judge's finding that the x-ray evidence did not establish the existence of coal workers' pneumoconiosis. (App. 102a)

Stapleton appealed the Board's order to the United States Court of Appeals for the Fourth Circuit arguing that the administrative law judge's invocation under 20 C.F.R. § 727.203(a)(1) was correct, but that the administrative law judge and Benefits Review Board erred in allowing rebuttal under 20 C.F.R. § 727.203(b)(4) where invocation had been established under subsection (a)(1).

Respondent Westmoreland Coal Company adopts the statement of the case regarding the remaining claims as set forth in the Brief of Petitioner.

On February 11, 1985 the United States Court of Appeals for the Fourth Circuit on its own motion consolidated three cases for an *en banc* review. At this time the Court of Appeals requested that two questions be ad-

dressed by the parties to this appeal. The first question posed by the *en banc* panel is the same question which is present before this Court; that is, "whether any single item of evidence invokes the presumption, notwithstanding the presence in the record of equally probative or more probative likekind evidence?" Regarding this question the United States Court of Appeals for the Fourth Circuit directed the parties to address the Circuit's earlier decision in *Consolidation Coal v. Sanati,* 713 F.2d 480 (4th Cir. 1983).

On February 26, 1986, the United States Court of Appeals for the Fourth Circuit rendered its decision in *Stapleton* (785 F.2d 424 (4th Cir. 1986) (App. 1a)). In doing so, the Court overruled its prior decision in *Sanati, supra,* and by a seven to four majority held that the interim presumption is invoked when there is credible evidence that a qualifying x-ray, ventilatory function study, or arterial blood gas study meets the description of standards set forth in the interim presumption. Further, the Court held that a single reasoned medical opinion is sufficient to provide for invocation of the interim presumption even in the face of competing, opposite opinions and conclusions.

The denial of benefits to Stapleton was affirmed as the Court held that invocation by a single x-ray was appropriate and that rejection of the x-ray evidence on rebuttal was also appropriate where a preponderance of the evidence on rebuttal established that Stapleton did not have coal workers' pneumoconiosis. The Court vacated and remanded the denial of Ray's claim and affirmed the award of benefits in Cornette.

II.

SUMMARY OF THE ARGUMENT

The standard of proof which governs the adjudication process under the Black Lung Benefits Act, as amended, is governed by the Administrative Procedure Act which provides for a preponderance of the evidence standard to be utilized. The United States Court of Appeals for the Fourth Circuit has erred in refusing to apply the preponderance standard to the invocation of the interim presumption. This preponderance of the evidence standard has been utilized since the inception of the interim presumption and has therefore been applied to a large number of cases which have either been resolved or are currently in the appellate process.

Because invocation of the interim presumption by any one of five factors means two other critical factors necessary for an award of benefits are presumed, the standard for determining invocation by any one of the five methods should be by a preponderance of the evidence, and not by a mere scintilla.

III.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN FINDING THAT THE MERE EXISTENCE OF ONE POSITIVE X-RAY; OR ONE SET OF QUALIFYING VENTILATORY STUDIES; OR ONE SET OF QUALIFYING ARTERIAL BLOOD GAS STUDIES; OR ONE PHYSICIAN'S OPINION AUTOMATICALLY INVOKES THE INTERIM PRESUMPTION EVEN WHERE A PREPONDERANCE OF THE EVIDENCE IN EACH SUB-CATEGORY WOULD NOT WARRANT SUCH INVOCATION.

The regulatory section adopted by the Secretary of Labor to implement the interim preseumption is bifurcated into sections dealing with the invocation and rebuttal of that presumption. There are five different ways in which the presumption can be invoked. Each requires a preliminary showing that the miner was engaged in coal mine employment for a minimum period of ten years.[7] With proof of employment, the miner is presumed totally disabled as a result of coal workers' pneumoconiosis if it is established through any one of these criteria that: (1) he has coal workers' pneumoconiosis as evidenced by a chest x-ray, biopsy or autopsy; (2) his performance on ventilatory function studies falls below certain specified levels; (3) his performance on arterial blood gas studies falls below certain specified levels; (4) he is totally disabled by a respiratory or pulmonary condition as evidenced by other medical evidence including the documented opinion of a physician exercising reasoned medical judgment; or (5) in the case of a deceased miner where no other medical evidence is available, the affidavit of a surviving spouse or

[7] *But see Halon v. Director*, 713 F.2d 30 (3d Cir. 1983).

other person with knowledge of the miner's physical condition which demonstrates the presence of a totally disabling respiratory or pulmonary impairment. (20 C.F.R. § 727.203(a))[8]

The interim presumption provides a claimant who has at least ten years of coal mine employment with a powerful advantage in the consideration of his claim. By showing by a preponderance (or by a scintilla as mandated by *Stapleton*) of the evidence of the existence of one of these five criteria, the claimant is presumed (1) to have coal workers' pneumoconiosis; (2) to be totally disabled by a pulmonary or respiratory impairment; and (3) that the impairment arose out of his coal mine employment.[9] This advantage is easily illustrated by referring to each of these five subsections. Under subsection (a)(1), a miner with ten years of coal mine employment can establish by chest x-rays showing simple coal workers' pneumoconiosis not only that he has the disease, but he will be presumed to be totally disabled thereby. This presumption of total disability arises dsepite the fact that x-ray evidence establishes only the existence of the disease and in no way indicates any level of disability. *See, Usery v. Turner Elkhorn Coal Co.*, 428 U.S. 1 (1969); *Webb v. Armco Steel Corp.*, 6 BLR 1-1120 (BRB 1984); *Arnoni v. Director, Office of Workers' Compensation Programs*, 6 BLR 1-423 (BRB 1983); *Engle v. Pagnotti Enterprises*, 5 BLR 1-746 (BRB 1983); *Spencer v. Winston Mining*, 1 BLR 1-996 (BRB 1978).

[8] The fifth method of invocation because it relates only to deceased miners, was not directly considered by the Court in *Stapleton*. However, the legal issues are the same as those relating to claims by a living miner.

[9] A claimant need only invoke under any one of the five subsections and once invocation is found by the trier of fact, no further inquiry need be made regarding the other possible methods of invocation. *See, Taranto v. Barnes and Tucker Co.*, 4 BLR 1-308 (BRB 1981).

In the alternative, under subsections (a)(2) and (a)(3), a claimant may establish by obtaining values lower than those set forth in the table accompanying these subsections not only that he suffers from a totally disabling pulmonary or respiratory impairment, but that the impairment arises from coal workers' pneumoconiosis caused by coal mine employment. Because values lower than those set forth in these tables, in medical fact, at the most may illustrate some degree of respiratory impairment of unknown origin, this again illustrates the tremendous power of the interim presumption.[10]

Under subsection (a)(4), a claimant may establish entitlement to the interim presumption by presenting a documented opinion of a physician which establishes the presence of a totally disabling respiratory or pulmonary impairment. A physician's report or other medical evidence which reflects the presence of a totally disabling respiratory or pulmonary impairment also establishes that the impairment is the result of coal workers' pneumoconiosis and that the coal workers' pneumoconiosis arose from coal mine employment.

Finally, under subsection (a)(5) in the absence of other medical evidence regarding a deceased miner, the claimant need only provide an affidavit of a survivor of the miner or other person with knowledge of the miner's physical condition for it to be presumed that the miner suffered from pneumoconiosis, that the miner was totally disabled

[10] The medical criteria of the interim presumption were not considered medically sound, were not intended to be medically sound, and were in fact constructed without reference to meaningful medical considerations for the evaluation of disability. No medical inference whatever arises from the fact that results on a particular study fall either above or below the tables set forth in these presumptions — the tables have only legal significance and are only relevant in invocation.

due to pneumoconiosis at the time of death, or that the miner's death was due to pneumoconiosis.

The power of the interim presumption arises not from its invocation by a scintilla of the evidence which meets one of the sub-categories, but from the fact that once a claimant establishes his ability to meet the requirements of any one of these sub-categories by a preponderance of the evidence, the rest of the elements of the claim are presumed; the presumption acts to fill in the remaining pieces of the puzzle necessary for entitlement to black lung benefits. Where only simple coal workers' pneumoconiosis is shown, the presumption provides for a finding of total disability due to pneumoconiosis unless that presumptive finding can be rebutted.

The standard of proof requiring that a preponderance of the evidence be weighed in any sub-cateogry prior to invocation of the interim presumption is well-founded in both the Act, regulations and case law. § 422(a) of the Black Lung Benefits Act, as amended, 30 U.S.C. § 932(a) incorporates by reference the procedural provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, (hereinafter "Longshore Act").[11] Be-

[11] § 422(a) During any period after December 31, 1973, in which a State workmen's compensation law is not included in the list published by the Secretary under section 421(b) of this part, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927), as amended, and as it may be amended from time to time (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof), shall (except as otherwise provided in this subsection or by regulations of the Secretary and except that references in such Act to the employer shall be considered to refer to the trustees of the fund, as the Secretary considers appropriate and as is consistent, with the provisions of [section 424] section 9501(d) of the Internal Revenue Code of 1954), be applicable to each operator of a coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine, ...

cause this Act was passed in early 1972, and subsequently the Longshore Act was amended on at least two occasions, it has been contended that § 422 only incorporate the Longshore Act in its form prior to the 1972 amendments.

The circuits have held, however, that § 422 effectively incorporates the appropriate provisions of the Longshore Act and any subsequent amendments.[12] Section 19(d), enacted with the 1972 amendments, provides that longshore hearings are to be conducted in accordance with the A.P.A. (5 U.S.C. § 554). Furthermore, because the Black Lung Benefits Act, as amended, does not indicate a specific standard of proof which governs the adjudication process, § 5 of the APA, (5 U.S.C. § 554) applies, ". . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[13] This Court in the case of *Steadman v. Securities and Exchange Commission*, 450 U.S. 91, *reh. den.* 451 U.S. 933 (1981), held that 5 U.S.C. § 556 (designated § 7(c) of the 1946 Act) provides for a preponderance of the evidence standard. Mr. Justice Brennan for the Court stated:

> The language and legislative history of § 7(c) lead us to conclude, therefore, that § 7(c) was intended to establish a standard of proof and that the

[12] *Patton v. Director*, 763 F.2d 553 (3d Cir. 1985), *Director v. National Mines Corp.*, 554 F.2d 1267 (4th Cir. 1977), *Director v. Alabama By-Products Corp.*, 560 F.2d 710 (5th Cir. 1977), *Director v. Eastern Coal Corp.*, 561 F.2d 632 (6th Cir. 1977) and *Director v. Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977).

[13] 5 U.S.C. § 559 requires the application of the requirements of the APA unless the statute expressly supersedes or modifies the requirements of the APA. The Federal Black Lung Benefits Act, as amended, does not expressly amend the requirements of the APA in this area.

> standard adopted is the traditional preponderance of the evidence standard.
>
> (450 U.S. 102)

The application of a preponderance standard to the invocation of the interim presumption has been consistently applied since the effective date of the interim presumption by the United States Department of Labor. Further, the Benefits Review Board, the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Sixth Circuit have issued opinions setting forth this preponderance standard. The Fourth Circuit in *Consolidation Coal Co. v. Sanati*, 713 F.2d 480 (4th Cir. 1983) was confronted with the question of whether or not the interim presumption under subsection (a)(4) must be invoked by a single reasoned medical opinion of a physician who finds a totally disabling pulmonary or respiratory impairment. The Court noted that a preponderance of the evidence standard has been required for invocation of the interim presumption even under the more lenient evidentiary criteria applied to claims under Part B and held that:

> Invocation of the § 727.203(a)(4) presumption solely on the basis of one physician's opinion, without weighing it against other physicians' contrary opinions, is contrary to our holdings in *Sharpless v. Califano*, 585 F.2d 664 (4th Cir. 1978), and *Petry v. Califano*, 577 F.2d 860 (4th Cir. 1978). *Sharpless* and *Petry* involved the similar presumptions of total disability due to coal workers' pneumoconiosis provided for in 20 C.F.R. §§ 419.490(b) and 410.414(b), respectively. In both cases, we held that the claimant has the burden of proving by a preponderance of the evidence all the facts necessary to establish the

> presumption. 585 F.2d at 667; 577 F.2d at 864; *see Steadman v. S.E.C.*, 450 U.S. 91 (1981). Our cases require the administrative tribunal to weigh all the evidence relevant to a fact necessary to establish a presumption before deciding to invoke the presumption. 585 F.2d at 667; 577 F.2d at 863. We note in passing that in cases involving at least two of the other presumptions set out in 727.203(a), the Board itself has held that an ALJ must consider and weigh all the competent and relevant evidence bearing on the fact in question in determining whether to invoke the presumption.

(713 F.2d at 481-82)

In *Bozick v. Consolidation Coal Company*, 735 F.2d 1017 (6th Cir. 1984), a panel of the Sixth Circuit recognized the Fourth Circuit's opinion in *Consolidation Coal Co. v. Sanati* and adopted the Benefits Review Board's decision in *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (BRB 1984). In *Meadows*, the Board noted,

> Recently, however, in *Consolidation Coal Company v. Sanati*, 713 F.2d 480 (4th Cir. 1983), the United States Court of Appeals for the Fourth Circuit held that, 'One such documented [opinion] in the presence of other and contrary evidence may not require *the presumption to be invoked absent a weighing of the opinion against the other evidence.' Id.*, at 482, n. 3 (emphasis in original.) The Court held that where the record contains conflicting medical reports, it is the obligation of the administrative law judge to weigh all the medical reports of record and ascertain whether or not claimant has established the presence of a totally disabling respiratory or pulmonary impairment pursuant to subsection (a)(4). We find the Court's reasoning persuasive. We note, as did the Fourth Circuit, that a single opinion may invoke the interim presumption. That opinion must be weighed, however, against the other medical opinions prior to invocation.

(6 BLR 1-776)

This decision citing *Sanati* was consistent with earlier decisions of the Benefits Review Board in *Justice v. Jewell Ridge Coal Co.*, 3 BLR 1-547, 1-550 (BRB 1981) involving chest x-rays and *Strako v. Ziegler Coal Co.*, 3 BLR 1-136, 1-143 (BRB 1981) involving pulmonary function studies.

In July of 1985, the United States Court of Appeals for the Sixth Circuit in *Moseley v. Peabody Coal Co.*, 769 F.2d 357 (6th Cir. 1985) adopted the Fourth Circuit's *Sanati* opinion requiring a preponderance standard prior to invocation under § 727.203(a)(4). This adoption of *Sanati* was also followed by the Sixth Circuit in *Engle v. Director, Office of Workers' Compensation Programs*, 792 F.2d 63, 64, n. 1 (6th Cir. 1986).

In 1986, the United States Court of Appeals for the Fourth Circuit rendered its decision in *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424 (4th Cir. 1986). In *Stapleton*, seven members of the *en banc* panel set forth in three separate opinions their belief that the interim presumption under § 727.203(a) is invoked where there is a single credible piece of evidence under any of the five means of invocation discussed by the Court.[14] A different group of seven judges, however, held that, under (a)(4) where invocation is by any means other than a reasoned medical opinion, it must be proven by a preponderance of the evidence other than arterial blood gases, pulmonary

[14] *Cline v. Beatrice Pocahontas Coal Co.*, 802 F.2d 1524 (4th Cir. 1986); *Accord Lagamba v. Consolidation Coal Co.*, 787 F.2d 172 (4th Cir. 1986); *Haynes v. Jewell Ridge Coal Co.*, 790 F.2d 1113 (4th Cir. 1986).

function studies, chest x-rays or by a reasoned medical report.

The decision of the *Stapleton* Court was, at best, inconsistent if not schizophrenic. As noted by Judge Phillips in his concurring and dissenting opinion,

The burdens of persuasion borne by both claimant and operator respectively are burdens to prove the relevant facts by a preponderance of the evidence.* * *

Given the conceptual and practical difficulties involved, it is, therefore no reproach to the drafters of the "interim presumption" of 20 C.F.R. § 727.203 to start with the proposition that this presumption's intended operation is by no means manifest from its 'plain words'. That very fact, however, makes it difficult to find any particular interpretation of its intended operation 'plainly erroneous or inconsistent' in relation to its text.

(785 F.2d at 442)

As Judge Phillips noted, it is the inexact language of the individual subsections of the interim presumption which have in no small part helped to obscure the requirements of the APA that each subsection be proved by a preponderance of the evidence prior to invocation. If we examine the language of subsection (a)(1), it states that the interim presumption will be triggered if, "*A* chest roentgenogram (x-ray), biopsy or autopy *establishes* the existence of pneumoconiosis. (*See,* § 410.428 of this title) (emphasis added) In contrast, subsection (a)(2) states that the interim presumption will be invoked if,

> Ventilatory studies *establish* the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which were equal to or less than the values specified in the following table. (emphasis added)

Subsection (a)(1) speaks of "*A* chest roentgenogram . . .", clearly indicating that a chest x-ray, a biopsy or an autopsy which establishes the presence of pneumoconiosis may result in invocation. Subsection (a)(2), however, speaks in the plural form indicating that, "ventilatory studies . . . as demonstrated by values . . ." must be considered before determining whether or not the presumption is invoked. Likewise, subsection (a)(3) dealing with arterial blood gas studies again speaks in the plural. Subsection (a)(4) speaks of,

> Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling pulmonary or respiratory impairment.

Subsection (a)(4) speaks in both the singular and the plural in describing "other medical evidence (plural) and ". . . a physician exercising . . ." (singular). Finally, subsection (a)(5) speaks in terms of, "The affidavit of the survivor . . .", which speaks in the singular while noting that it would only be applicable in the absence of other medical evidence. The inartfulness of the United States Department of Labor's drafting, however, does little to provide insight as to whether the scintilla or preponderance standard should be applied to the interim presumption. It can be fairly stated that the interim presumption internally does not set forth any burden of proof different than that required by APA.

Westmoreland concedes that a single x-ray, single pulmonary function study, single arterial blood gas study, or single reasoned medical report which finds a totally disabling pulmonary or respiratory impairment or in the absence

of any medical evidence, a single affidavit, may suffice to invoke the interim presumption. However, where a preponderance of the chest x-rays are negative for coal workers' pneumoconiosis; a preponderance of the ventilatory studies are above those standards set forth in the interim tables; where a preponderance of the arterial blood gas studies have values above those in the interim tables; where a preponderance of the physicians' opinions exercising reasoned medical judgment does not establish the presence of a totally disabling pulmonary or respiratory impairment; or where there are multiple affidavits present with a preponderance not supporting that a decedent suffered from a totally disabling pulmonary or respiratory disease, then the interim presumption should not be invoked by a single piece of medical or lay evidence.

In determining the preponderance of the evidence, an administrative law judge traditionally has looked to the relative qualifications of the individual physicians, the adherence to quality standards and (due to the progressive and irreversible nature of this disease) may place greater reliance on more recent testing. *See, Orange v. Island Creek Coal Co.*, 786 F.2d 724 (6th Cir. 1986) *Triplett v. Incoal Coal Co.*, 2 BLR 1-633 (BRB 1979); and *Cleavenger v. Director*, 2 BLR 1-557 (BRB 1979) As a result, an administrative law judge in evaluating whether or not the interim presumption is invoked under subsection (a)(1), may credit the more recent chest x-rays as well as crediting those chest x-rays by "B" readers.[15] Because these deter-

[15] The National Institute for Occupational Safety and Health was required by the Federal Mine Safety and Health Act of 1977 to develop and implement a certification program for readers of coal miners' chest roentgenograms. A "B" reader certification is the highest classification and thereby entitled to greater evidentiary weight. *See*, 42 C.F.R. §§ 37.1 *et seq.*, *Winfrey v. Califano*, 620 F.2d 37 (4th Cir. 1980) and *Sharpless v. Califano*, 585 F.2d 664 (4th Cir. 1978).

minations are within the sound discretion of the trier of fact, the invocation of the interim presumption does not resolve itself down to a mere numbers game, where an administrative law judge mechanically determines the invocation of the interim presumption based upon the amounts of qualifying or nonqualifying medical evidence. Furthermore, because of the remedial nature of the Act, it is appropriate for the administrative law judge to resolve all true doubt [i.e., the doubt which arises when the evidence tending to prove a fact and that tending to disprove a fact is equally probative and persuasive] in favor of the claimant in determining whether or not to invoke the interim presumption.

Nowhere in the APA, Longshore Act or the Federal Black Lung Benefits Act, however, is it suggested that a standard other than that commonly utilized by the APA, that of a preponderance, should be utilized in determining invocation under the interim presumption. The Court's suggestion in *Stapleton* that a scintilla of positive evidence in the face of a preponderance of negative evidence shall result in findings of invocation is not supported in the Act, regulations, or case law.

It is precisely because of the tremendous power of the interim presumption that the issue of whether invocation is by a scintilla or by a preponderance of the evidence becomes important. Under the rule of law set forth by the Fourth Circuit in *Stapleton*, the medical record could contain ten negative x-rays, all by Board-certified radiologists and N.I.O.S.H. certified "B" Readers, with one positive x-ray having been read by a general practitioner thus resulting in invocation of the interim presumption. Notwithstanding above-standard arterial blood gases and pulmonary function studies, if there are no medical opinions in

the record, this single positive x-ray arising from a poorly qualified practitioner, would in the absence of a reasoned medical opinion to the contrary, result in invocation. The presumption could then not be rebutted by the ten readings of the same chest x-ray even if they were more recent in time and by more qualified practitioners, due to the prohibition in the Act that a claim shall not be rejected solely on the basis of negative x-ray readings. This wholly improper result fits the requirements laid down by *Stapleton* while doing violence to the basic precepts of the Act and regulations.

V.

CONCLUSION

Deference should be paid to the burden of proof prescribed by the APA, to the interpretation of the Secretary and to the practice of the administrative law judges and Benefits Review Board which have governed the resolution of thousands of federal black lung claims and continues to govern their disposition in those circuits other than the Third and Fourth Circuits. Therefore, Westmoreland Coal Company requests that the opinion of the United States Court of Appeals for the Fourth Circuit in *Stapleton v. Westmoreland Coal Company* be reversed consistent with the arguments raised herein.

Respectfully submitted,

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